(2) No. 95-130

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CORNISH SHIPPING LTD.,

Petitioner,

—v.—

INTERNATIONAL NEDERLANDEN BANK N.V.,
f/k/a NMB POSTBANK GROEP, N.V.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Did the Second Circuit Court of Appeals and District Court for the Southern District of New York correctly deny a shipowner's attempt to extend a maritime lien on subfreights to reach funds that had been paid to a charterer's agent?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.1 of the Supreme Court Rules, respondent Internationale Nederlanden Bank N.V., formerly known as NMB Postbank Groep, N.V. ("INB") has a publicly traded parent corporation: ING Group, Amsterdam, The Netherlands.

TABLE OF CONTENTS

PAGE

Question Presented i

Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities iv

Statement of the Case 1

Reasons for Denying the Petition 5

POINT I

A MARITIME LIEN IS NOT MAINTAINED FOR THE ASSURANCE OF THE PARTIES INVOLVED. IT IS A SECRET LIEN WHICH IS INTENDED TO PROMOTE COMMERCE AND SHIPPING. IT IS STRICTLY CONSTRUED AND NOT SUBJECT TO EXPANSION SO AS TO AVOID CREATION OF OBSTRUCTIONS TO INTERNATIONAL COMMERCE 6

POINT II

THE DECISION OF THE COURT BELOW WAS NOT AN "EXTRAORDINARY RESULT" BUT WAS CONSISTENT WITH THE PRECEDENT OF THIS COURT AND THE DECISIONS OF THE CIRCUIT COURTS OF APPEAL 8

Conclusion 12

TABLE OF AUTHORITIES

Cases	PAGE
A/S Dampskibsselskabet Torm v. Beaumont Oil Ltd., 927 F.2d 713 (2d Cir.), *cert. denied*, 502 U.S. 862 (1991)	7
American Steel Barge Co. v. Chesapeake & O. Coal Agency Co., 115 F. 669 (1st Cir. 1902)	8, 9
Beverly Hills Nat'l Bank & Trust Co. v. Compania de Navegacione Almirante S.A., 437 F.2d 301 (9th Cir.), *cert. denied*, 402 U.S. 996 (1971)	8
Compania Sud Americana de Vapores v. Atlantic Caribbean Shipping Co., 587 F. Supp. 410 (S.D. Fla. 1984)	8
Itel Containers Int'l Corp. v. Atlanttrafik Express Serv. Ltd., 982 F.2d 765 (2d Cir. 1992)	7
Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1 (1920)	6, 11
Tagart Beaton & Co. v. James Fisher & Sons, 1 K.B. 391 (C.A. 1903)	8, 9
The DIANA, 423 F.2d 1 (2d Cir. 1970)	8, 9, 10
The SATURNUS, 250 F. 407 (2d Cir.), *cert. denied*, 247 U.S. 521 (1918)	7, 11
Tramp Oil and Marine, Ltd. v. M/V MERMAID I, 805 F.2d 42 (1st Cir. 1986)	7
Union Industrielle et Maritime v. Nimpex Int'l, Inc., 459 F.2d 926 (7th Cir. 1972)	8, 9
United States v. Freights etc. of the S.S. MOUNT SHASTA, 274 U.S. 466 (1927)	8, 9, 10, 11

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BRIEF IN OPPOSITION

Statement of the Case

A. Introduction

This case presents neither the conflicts the Petition alleges nor any other issues worthy of this Court's review. In a well-reasoned opinion by Chief Judge Jon O. Newman, the U.S. Court of Appeals for the Second Circuit affirmed the District Court's decision concluding that "a shipowner's lien on sub-freights does not attach to funds that have been paid to the charterer or its agent . . ." (App. 2a). Accordingly, the Second Circuit properly determined that Cornish was not entitled to assert a maritime lien on a portion of the proceeds of a

letter of credit paid to the charter's lender, INB, which was indisputably the charterer's agent for purposes of collection as well as the assignee of the letter of credit proceeds. Contrary to the arguments raised by Petitioner, Cornish Shipping Ltd. ("Cornish" or "Petitioner") this result is neither extraordinary nor is it in contravention of other circuit court decisions.

B. Background

The present dispute arises out of a New York Produce Exchange Form charter by Ferromet Resources, Inc. ("Ferromet") of the M/V FILOKTITIS from its owner, Cornish. Ferromet intended to use the vessel to transport two shipments of steel scrap to Korea pursuant to a contract between Ferromet, as seller, and Pohang Iron & Steel Co. Ltd. ("POSCO"), as purchaser. In order to pay Ferromet for the steel scrap, as well as insurance and the transportation costs of the steel scrap, POSCO opened an irrevocable letter of credit at Shinhan Bank ("Shinhan L/C").

For a period of several years prior to the transaction at issue, Ferromet had a credit relationship with INB. In the context of this relationship, Ferromet received financing from INB as well as other banks. INB and Ferromet had entered into a loan agreement for one of the scrap steel cargoes which ultimately was loaded on the FILOKTITIS. INB did not negotiate the terms of Ferromet's sale to POSCO nor its charter of the vessel; it simply provided financing to Ferromet for this transaction. As part of its security, INB received an assignment of the proceeds of the POSCO sale and accordingly made appropriate U.C.C. security filings. INB advanced more than $3.38 million to Ferromet for the transaction.

In early January 1992, the scrap steel destined for Korea was loaded on the FILOKTITIS. On January 30, 1992, INB received the documents from Ferromet necessary to draw down on the Shinhan L/C. In accordance with standard banking practice, INB reviewed the documents and dutifully

notified Shinhan Bank of five minor discrepancies appearing in the documents. On February 3, 1992, Cornish sent a notice of lien on subfreight to POSCO and Shinhan Bank. Because of the minor documentary discrepancies identified by INB, POSCO was able to prevent the immediate drawdown of the letter of credit.

At or about the same time, an unrelated Ferromet creditor attached the bunkers (fuel oil) aboard the FILOKTITIS while the vessel was at the Panama Canal. The bunkers ostensibly were Ferromet's property and subject to attachment by its creditor.

Given its various financial problems, Ferromet approached INB for assistance in resolving the situation. Thus, INB entered negotiations with Ferromet, Cornish, POSCO and the unrelated creditor in order to lift the bunker attachment in Panama. As a result of the negotiations, INB advanced an additional $250,000 to Ferromet to fund an escrow covering the disputed claim of the unrelated creditor. In addition, INB agreed to fund a further loan to Ferromet in the amount of $52,000 for Panama Canal fees and other charges.

In exchange for INB's agreement to provide these further advances to Ferromet which would resolve the dispute with the unrelated creditor, POSCO agreed to waive the documentary discrepancies under the Shinhan L/C. POSCO sent a letter to INB, which reflects the terms of the agreement between INB and POSCO. There is no mention in the letter of any promise by INB to pay Cornish's hire claim against Ferromet for the simple reason that no such promise ever was made by INB. This letter was a part of the record below. Despite Cornish's sweeping assertions to the contrary, which were made both before the District and Circuit Courts, no competent evidence ever was submitted to any court that INB acted wrongfully.[1]

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[1] Further, as noted by the appellate court below, POSCO had subsequently initiated a suit against INB and Ferromet in New York Supreme

In accordance with the POSCO/INB agreement, INB escrowed $250,000 and advanced the Panama Canal fees. The unrelated creditor's attachment of the vessel's bunkers was lifted. On the same day, Shinhan Bank confirmed POSCO's waiver of the discrepancies under the Shinhan L/C and the payment to INB was made by wire transfer through international banking channels. INB then applied the payment ($2,995,426.01) to reduce the $3.3 million loan made to Ferromet to finance the scrap steel transaction. However, even after application of the L/C payment, Ferromet still owed INB an additional $16 million from this and other transactions.

Not content with the assertion of its lien against POSCO, Cornish then obtained an *ex parte* Order from the Panamanian Court and arrested the cargo onboard the vessel, despite Cornish's prior issuance of bills of lading for the cargo which were marked "freight pre-paid". The vessel then remained in Panama for 82 days while Cornish and POSCO litigated whether Cornish's cargo arrest was valid. Ultimately, Cornish and POSCO reached an agreement whereby POSCO paid Cornish $650,000 to obtain the release of the cargo. On May 15, 1992, the vessel left Panama and proceeded to Korea where it discharged the cargo.

After a period of discovery, Cornish, the intervening plaintiff, POSCO, and INB presented cross-motions for summary judgment before the District Court.[2] After the District Court

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Court, alleging a cause of action, among others, for common-law fraud in connection with the POSCO/INB agreement (App. 6a n.3). After the Second Circuit's decision, POSCO and INB entered into a stipulation of dismissal of the state court action. Consequently, the state court action has now been dismissed. Of course, POSCO, the supposed aggrieved party, has not joined in Cornish's certiorari petition.

[2] Even though Cornish made repeated attempts to make an issue of INB's supposed misconduct in this matter, it commenced yet another action against INB in the Southern District of New York after entry of the District Court's judgment and while the present matter was *sub judice* before the Second Circuit. That action improperly seeks to spin off common law claims arising from the same transaction as in this Petition.

found in INB's favor, Cornish and POSCO appealed to the Appellate Court below. In affirming the finding of the District Court, the Circuit Court carefully considered Cornish's and POSCO's arguments but rejected their positions.

Reasons for Denying the Petition

In the decision below, the Second Circuit reviewed the nature of the *res* that was the subject of the lien on subfreights. The court determined that that lien reaches the debt for subfreights, but does not reach any particular funds in the consignee's account, or more pertinently, in the charterer's own accounts. Petitioner misconstrues the holding of the Second Circuit and overlooks the court's rationale. Chief Judge Newman summarized the court's holding:

> Although this precise issue has not previously been resolved, prior cases and important policy considerations favor the view that a shipowner's lien on subfreights represents a contingent right to collect a debt directly from a consignee, rather than a right to specific funds that the consignee intends to use or has used to satisfy that debt. In accordance with this view, we conclude that the shipowner's lien does not give it a right to trace specific funds that the consignee has paid to a charterer.

(App. 7a).

Chief Judge Newman explained that the exercise of the lien "should vest the owner with the rights that the charterer would otherwise have under the contract of affreightment to proceed against that debt." (App. 11a).

This holding and rationale is perfectly in accord with precedent and the public policy underlying the strict construction of maritime liens. Contrary to Petitioner's assertion, there is

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Cornish's new action against INB currently is before the District Court and INB intends to defend that matter vigorously.

no conflict among the circuits, nor is the decision a radical revision of the maritime lien on subfreights. Indeed, Cornish's overstatement that the Second Circuit decision "pulls most of the teeth out of the lien on the subfreights" (Petition at 5) is belied by Cornish's ability in this case to force POSCO to settle by paying an additional $650,000 in freight to Cornish after it already had paid more than one million dollars for the freight to Ferromet.

In seeking the review of the decision of the Second Circuit, Cornish chooses to blink at its ability to enforce the lien on subfreights in the traditional manner by asserting it against the payor of the debt. By defining further the nature of subfreight that is affected by the lien, the Second Circuit reaches a conclusion that is in accord with prior case law. In sum, a shipowner such as Cornish remains able to seek redress against the payor, but as before, simply cannot attempt to trace and recover funds from the charterer or its agent.

POINT I

A MARITIME LIEN IS NOT MAINTAINED FOR THE ASSURANCE OF THE PARTIES INVOLVED. IT IS A SECRET LIEN WHICH IS INTENDED TO PROMOTE COMMERCE AND SHIPPING. IT IS STRICTLY CONSTRUED AND NOT SUBJECT TO EXPANSION SO AS TO AVOID CREATION OF OBSTRUCTIONS TO INTERNATIONAL COMMERCE

As recognized by both courts below (App. 17a, 27-28a), it is a well-established principle that maritime liens are construed strictly and disfavored in the law. In *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 12 (1920), this Court stated:

> The maritime lien is a secret one. It may operate to the prejudice of prior mortgagees or of purchasers without

> notice. It is therefore *stricti juris* and will not be extended by construction, analogy or inference.

Any attempt to extend the reach of a maritime lien should be summarily rejected, where such an extension would interfere with the settled course of maritime affairs, *see, e.g., Tramp Oil and Marine, Ltd. v. M/V MERMAID I*, 805 F.2d 42, 46 (1st Cir. 1986) or disrupt the normal course of international commerce. *Cf. A/S Dampskibsselskabet Torm v. Beaumont Oil Ltd.*, 927 F.2d 713, 721 (2d Cir.), *cert. denied*, 502 U.S. 862 (1991) (financing bank not liable for freight charges due to disturbing effect on banking and commerce).

As expressed more than 70 years ago:

> The ancient . . . lien of the sea *is not maintained . . . for the convenience or assurance of the parties, but for the encouragement of commerce and shipping . . . .* Anything more than this multiplies secret liens and hampers instead of advances ease and freedom of commerce. Merchant and mariner alike subject their property to the municipal law of every country into which their venture comes, but a maritime lien is as near an approach to jus gentium as can be found in private jurisprudence and any extension thereof not internationally well founded is to be opposed as jealously as is a denial of its accepted extent.

The SATURNUS, 250 F. 407, 414 (2d Cir.), *cert. denied*, 247 U.S. 521 (1918) (emphasis added); *see also Itel Containers Int'l Corp. v. Atlanttrafik Express Serv. Ltd.*, 982 F.2d 765 (2d Cir. 1992).

Before the District and Circuit Courts, Cornish (and POSCO) sought to expand the scope of a maritime lien on subfreight beyond any previous decision. The District Court properly rejected the attempt. So too, the appellate court below recognized that allowing the multiplication of these secret liens can lead to the disruption, not advancement, of

maritime commerce as exemplified by the fact that Cornish was prosecuting its supposed lien claims both in the District Court and the Panamanian Court. (App. 17a).

POINT II

THE DECISION OF THE COURT BELOW WAS NOT AN "EXTRAORDINARY RESULT" BUT WAS CONSISTENT WITH THE PRECEDENT OF THIS COURT AND THE DECISIONS OF THE CIRCUIT COURTS OF APPEAL

Petitioner argues that there is a conflict with *United States v. Freights etc. of the S.S. MOUNT SHASTA*, 274 U.S. 466 (1927); *Union Industrielle et Maritime v. Nimpex Int'l, Inc.*, 459 F.2d 926 (7th Cir. 1972); *The DIANA*, 423 F.2d 1 (2d Cir. 1970); *American Steel Barge Co. v. Chesapeake & O. Coal Agency Co.*, 115 F. 669 (1st Cir. 1902); and *Tagart Beaton & Co. v. James Fisher & Sons*, 1 K.B. 391 (C.A. 1903)[3]. None of these decisions, however, held that the lien on subfreights

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[3] Cornish also urges a conflict with *Beverly Hills Nat'l Bank & Trust Co. v. Compania de Navegacione Almirante S.A.*, 437 F.2d 301 (9th Cir.), *cert. denied*, 402 U.S. 996 (1971). In *Beverly Hills*, however, a claim was made for imposition of a constructive trust. No such claim was presented in this case. Indeed, as stated in note 2, *supra*, Cornish has commenced a separate action against INB while this matter was *sub judice* before the Second Circuit, urging this precise claim. Moreover, Cornish's arguments in notes 17 and 18 of the Petition are not well founded. Freight pre-paid bills of lading are not misrepresentations of the status of the freight, but an expression of the extension of credit to the recipient of the bill of lading. *See, e.g., Compania Sud Americana de Vapores v. Atlantic Caribbean Shipping Co.*, 587 F. Supp. 410 (S.D. Fla. 1984). The relationship between Ferromet and INB was a debtor-creditor relationship, not a confidential relationship. Finally, there was no competent evidence of an assumption by POSCO regarding satisfaction of Cornish's claim. To the contrary, POSCO's own letter agreement makes no reference to such a payment or use of the L/C funds.

reached a specific fund and allowed tracing of the fund into the charterer's accounts.

In this Court's decision in the *MOUNT SHASTA*, the subfreights were specifically referred to as an intangible, *i.e.*, the debt owing from the consignee to the charterer. 274 U.S. at 470. Enforcement of the lien on the debt required only that the debtor be subject to the jurisdiction of the court. This Court explained:

> Here the debtor is within the power of the Court and therefore the debt, if there is one, is also within it.

Id. at 471.

Similarly, in *American Steel Barge*, the First Circuit likened the owner's rights under the lien on subfreights to that of an assignee, 115 F. at 673, being subrogated to the remedies of the charterer, *Id.* at 674. The court explained that the action proceeds against the freight, with process to be served on "the holder of the bill of lading, or owner of the cargo, requiring him to pay the freight into the registry of the court." *Id.* at 674. Although not explicitly stated, the holder or owner are the proper parties to be notified, since they are the debtors responsible for payment of the freight.

In *Tagart, Beaton*, Lord Alverstone similarly concluded:

> [B]ut such a lien does not confer the right to follow the money paid for freight into the pockets of the person receiving it simply because that money has been received in respect of a debt which was due for freight.

1 K.B. at 395.

In *Nimpex* and *DIANA*, the courts reviewed the payment history of the freights. The *Nimpex* court found that freight payment had been made, thereby extinguishing claims by the owner. 459 F.2d at 930. This conclusion accords with the Second Circuit's analysis in the case at bar. As Chief Judge Newman explained:

> If it were true that the lien gave the owner an interest in the subfreights as funds, it would be logical for the owner to be able to execute the lien against those funds, or any identifiable portion of them, even if the consignee had paid them to the charterer before receiving notice of the lien. Under those circumstances, payment prior to notice should, at most, discharge the consignee's personal liability, rather than extinguish the owner's lien altogether. On the other hand, if the lien attaches to the subfreight only as a debt, it is easy to see why payment prior to notice completely extinguishes the lien: in that case, there is no longer any debt to attach.

(App. 13a-14a).

The comments by the *DIANA* court regarding payment similarly rest on the conclusion that the lien attaches to the subfreights as a debt, not as a separate fund. 423 F.2d at 5-6. Otherwise, the payment issue which the *DIANA* court found significant enough to require a remand for trial would actually have been immaterial.

The Second Circuit's opinion in this case harmonizes the many precedents regarding the lien on subfreights. It identifies the thread that runs through the analysis of each of these prior decisions; an analysis that in each case, explicitly or implicitly, recognizes that the lien operates on the intangible, *i.e.*, the debt which was due for freight.

Contrary to the argument of Cornish, this analysis does not undermine or obstruct enforcement of the lien. Thus, proceedings may be begun against the debtor, wherever the debtor is present either personally or through an agent. As this Court observed in *MOUNT SHASTA*, the debt is subject to arrest in these jurisdictions. This is, of course, without mention of the fact that the owner retains its right to assert its claims against the charterer or the payor.

Equally important, the Second Circuit's well-reasoned analysis preserves the limited nature of the lien, recognizing that

it exists solely to encourage commerce and shipping, not "for the assurance of the parties." *The SATURNUS*, 250 F. at 414. In view of the absence of notice, such a lien "may operate to the prejudice of prior mortgagees or of purchasers without notice." *Seaboard Fisheries*, 254 U.S. at 12. The lien is therefore strictly construed.

In summary, this case does not conflict with this Court's decision in *MOUNT SHASTA*, nor with the decisions of the other Courts of Appeal. The Second Circuit's analysis and conclusion recognizes the lien on subfreights and provides an appropriate framework for its enforcement.

CONCLUSION

RESPONDENT RESPECTFULLY SUBMITS THAT A WRIT OF CERTIORARI SHOULD NOT ISSUE TO REVIEW THE DECISION BELOW.

Respectfully submitted,

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